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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT C. GUCCIONE,

Petitioner,

against

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS HUSTLER MAGAZINE, INC. AND FLYNT DISTRIBUTING COMPANY, INC. IN OPPOSITION TO PETITION

ALAN L. ISAACMAN
(Counsel of Record)
DAVID O. CARSON
COOPER EPSTEIN & HURWITZ
9465 Wilshire Boulevard
Beverly Hills, California 90212
(213) 278-1111
Attorneys for Respondent Hustler Magazine, Inc.

JOHN H. GROSS
ANN V. KRAMER
ANDERSON RUSSELL KILL & OLICK, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700
Attorneys for Respondent Flynt Distributing Company, Inc.

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PRELIMINARY STATEMENT

Respondents Hustler Magazine, Inc. ("HMI") and Flynt Distributing Company, Inc., ("FDC")[1] submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The court below unanimously held that respondents were entitled to judgment as a matter of law on two independent grounds: (1) that the alleged libel, involving an accusation of adultery, was not actionable under the common law of the State of New York because it was substantially true in light of plaintiff's thirteen years as an open and admitted adulterer; and (2) plaintiff was libel-proof because of the

[1] HMI and FDC are ultimately owned by Larry C. Flynt. Mr. Flynt also owns LFP, Inc., a related corporation.

open and notorious quality of the adultery and its widespread publication.

There are no special or important reasons that warrant review of the decision below in this case which was termed a "grudge match" by the district court, centering as it did on the improbably defamatory accusation that Robert Guccione, publisher of *Penthouse* magazine, was an adulterer. Judge Newman's opinion for the Court of Appeals rested on both the settled state common law of substantial truth and an unexceptionable application of the libel-proof doctrine, which has been accepted by at least two courts of appeals and numerous district courts.[2] Even were this Court to review, as plaintiff urges, the libel-proof doctrine, the judgment below would necessarily remain undisturbed unless this Court were also disposed to pursue the unusual course of examining the Court of Appeals' application of New York's substantial truth defense to specific facts.

The admission by plaintiff of the truthfulness of previous published accounts of his adultery eliminates any basis for a claim of conflict among the circuits as to the applicability of the libel-proof doctrine. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 at n. 6 (D.C. Cir. 1984), *rev'd on other grounds*, 106 S.Ct. 2505 (1986), the District of Columbia Circuit expressly limited its criticism of the libel-proof doctrine to instances where "*none* of the repulsive attributes [defendants] imputed to [plaintiff] have been established or conceded to be true." *Id.* Here, plaintiff admitted the truth of his adultery.

Finally, the Second Circuit's conclusion that the undisputed facts made out a defense of substantial truth is soundly based. In all events, that holding, turning as it does on an assessment of a unique set of facts, presents no issue of general importance.

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[2] In addition to the Second Circuit, the Third Circuit has impliedly endorsed the doctrine. *Marcone v. Penthouse International Ltd.*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 106 S. Ct. 182 (1985). In *Marcone*, the Third Circuit held the doctrine inapplicable to a plaintiff who had neither been convicted of a crime, admitted criminal conduct, nor had a poor reputation with respect to the specific accusation claimed to be libelous—drug trafficking. *Id.* at 1079.

COUNTERSTATEMENT OF THE ISSUES

The case presents the following issues:

1. Is application of the libel-proof doctrine proper where plaintiff claims to have been libelled by an accusation of adultery in 1983, but was an admitted and open adulterer for 13 of the 17 years before the publication of the alleged libel?

2. Was the statement "Considering he is married and also has a live-in girlfriend, Kathy Keeton . . ." substantially true as a matter of New York State common law where Guccione admitted the statement was true for 13 of the 17 years before publication and where Keeton continued to be his live-in girlfriend through trial?

STATEMENT OF THE CASE

The facts of this case, the identity of the parties and the proceedings below are summarized in the decision of the Court of Appeals. Respondents further note the following:

1. Guccione testified at trial as follows:

> Q. Now, between 1966 and 1979 you did not hide your relationship with Ms. Keeton from your children, correct?
>
> A. That is correct.
>
> Q. Your children knew you were still married, correct?
>
> * * *
>
> A. Yes.
>
> Q. You did not hide that fact from them, did you, sir?
>
> A. No.
>
> Q. Between 1966 and 1979, you did not hide your relationship with Ms. Keeton from your parents, correct?
>
> A. That is correct.
>
> Q. Your parents still knew you were married, correct?
>
> A. They knew I was technically married, yes.
>
> Q. And between 1966 and 1979 you did not hide your relationship with Ms. Keeton from your social friends, correct?
>
> A. That is correct.

Q. And your social friends knew you were still married, correct?

A. I don't know that.

Q. Did you try to hide it from your social friends?

A. No.

Q. From 1966 to 1979 you did not hide your relationship with Ms. Keeton from your business associates, correct?

A. That's correct.

Q. Nor did you hide the fact that you were married, correct?

A. Correct.

Q. From 1966 through 1979 it was widely reported that you and Ms. Keeton were still living together, correct?

A. It was reported; I don't know how widely reported it was.

Q. Was it widely reported, sir?

* * *

A. I don't know to what extent it was reported, but *certainly everyone knew about it*.

Q. And during that period you did not hide the fact that you were married, correct?

A. That is correct.[3]

2. Articles discussing Guccione's status as an adulterer appeared in *Newsweek*, *New York* magazine and the *Washington Post*.

3. A former "Penthouse Pet," Anneka DiLorenzo, testified that Guccione had a poor reputation for sexual chastity.

4. The jury awarded Guccione $1.00 in compensatory damages, the lowest amount permitted by the district court.

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[3] Joint Appendix on Appeal pp. 655-657 (emphasis added).

5. In deciding the appeal, the court below dealt with only two of the numerous issues presented by respondents in their appeal of the district court's judgment. Therefore, any reversal in this Court would require remand to the Second Circuit for review of the other issues presented by respondents' appeal.

ARGUMENT

I.

THE APPLICATION OF THE LIBEL-PROOF DOCTRINE IN THIS CASE IS UNEXCEPTIONABLE

Petitioner claims that the application of the libel-proof doctrine in this case is a radical expansion that deprives petitioner of unspecified constitutional rights. The expansion claimed is that the libel-proof doctrine has generally been confined to plaintiffs whose reputations have been tarnished by criminal convictions. While there was no criminal conviction here, it was unnecessary because petitioner conceded that he had engaged in the specific type of criminal conduct of which he claimed he was libelously accused. The admission served the same purpose a conviction would have. In any event, a criminal conviction is not necessary for application of the libel-proof doctrine. *See Herbert v. Lando,* 781 F.2d 298 (2d Cir.), *cert. denied,* 106 S. Ct. 2916 (1986); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982); *Simmons Ford, Inc. v. Consumers Union,* 516 F. Supp. 742 (S.D.N.Y. 1981) (per Weinfeld, J.).

The rationale in libel-proof cases where a conviction is present, is that a criminal conviction is highly significant in weighing a libel claim because of the high standard of proof required to win one and because convictions are often the subject of publicity. *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. at 928. In this case, the widespread publicity about petitioner's marital status and relationship with Kathy Keeton was generated by petitioner's own public statements. In sum, petitioner's poor reputation on the subject

of adultery was of his own making and furnishes no basis for complaint.[4].

The libel-proof doctrine is a relatively recent one, first applied twelve years ago in *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639-40 (2d Cir. 1975), and has been discussed by only three courts of appeals and approximately a dozen district courts. The only controversy it has occasioned was in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 2505 (1986). In that case Justice (then Judge) Scalia questioned the fairness of applying the doctrine where it was not known whether the publicity which occasioned the plaintiff's poor reputation was accurate or not. *Liberty Lobby*, at 1568. Justice Scalia specifically distinguished cases, such as this one, where plaintiff has conceded the truth of the allegations which created his poor reputation. *Id.* at n.6. Thus, the claim that the instant case gives rise to a conflict among the circuits is groundless.[5]

Finally, petitioner complains that where there is evidence of actual malice, the libel-proof doctrine should not apply even if there is no likelihood of recovery for injury to reputation, on the theory that the court should permit recovery of nominal and punitive damages.[6] However, as this Court has written, the only valid state interest in libel law to weigh against the First Amendment is protection of reputation. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971); *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974).[7] The only proper purpose of libel laws is not to punish

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[4] Petitioner also complains that reputation should not have been proven through publications about him. However, the reputations of public figures are largely based on the publications about them and, thus, such publications are admissible to prove reputation. *Guccione v. Hustler Magazine, Inc.*, 7 Med. L. Rptr. 2077, 2083 (Ohio Ct. App. 1981), *cert denied*, 459 U.S. 826 (1982).

[5] Because there was no dissent from the denial of rehearing *en banc*, petitioner's claim to a conflict *within* the Second Circuit is also groundless.

[6] This argument was not raised by petitioner on appeal. It was first raised on petition for rehearing *en banc*. Rehearing was denied.

[7] Respondents do not concede that there was a basis for a finding of actual malice in this case, an issue that the Court of Appeals found it unnecessary to reach.

libellors but to compensate victims who have suffered injuries to their reputations. Where there is no such injury, "the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986).

II.

THE STATEMENT AT ISSUE WAS SUBSTANTIALLY TRUE WHICH CONSTITUTED A COMPLETE DEFENSE AS A MATTER OF STATE LAW

Petitioner also challenges the Court of Appeals' alternative and independent ground of decision--that the facts established the defense of substantial truth under applicable state law.

As set forth by the New York Court of Appeals over fifty years ago, the substantial truth defense is a simple one:

> A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934).

In its opinion the Second Circuit merely compared the statement as published:

> "Considering he is married and also has a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man."

with the precise truth:

> Considering that from 1966 to 1979 he was married and also had a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man.

Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 302 (2d Cir. 1986). The court concluded that the predictable effect of the truth on the mind of the reader was, in fact, more damaging than the effect of the published statement because the latter did not point out the extreme length of Guccione's adulterous conduct. *Id.*

To avoid this unassailable conclusion by Judge Newman, petitioner argues that there is a possible interpretation of the statement to which the substantial truth defense would not apply. He states that the statement could be read as if it alleged a specific act of adultery which was taking place at the moment of publication in November 1983. As the Court of Appeals pointed out, however, the statement "alleged ongoing relationships—marriage to his wife and cohabitation with his girlfriend," which could not "fairly be read to mean that the marriage and the cohabitation existed simultaneously *only* at a moment or brief interval just prior to the article's publication." *Id.* This determination as a matter of law was certainly within the court's power to make under both New York State and federal precedents. *Anderson v. Cramlet,* 789 F.2d 840, 841-46 (10th Cir. 1986); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Cafferty v. Southern Tier Publishing Co.*, 226 N.Y. 87, 92-93, 123 N.E. 76 (1919); *Klein v. Prial,* 32 A.D. 2d 925, 302 N.Y.S. 2d 295, 296 (2d Dept. 1969), *aff'd,* 28 N.Y. 2d 506, 318 N.Y.S. 2d 946, 267 N.E. 2d 589 (1971). The only fair reading was that Guccione had engaged in adultery over an undefined period. This was, in fact, true and a complete defense to the libel under the applicable state law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

ALAN L. ISAACMAN
(Counsel of Record)
DAVID O. CARSON
COOPER EPSTEIN & HUREWITZ
9465 Wilshire Boulevard
Beverly Hills, California 90212
(213) 278-1111
Attorneys for Hustler Magazine, Inc.
JOHN H. GROSS
ANN V. KRAMER
ANDERSON RUSSELL KILL & OLICK
666 Third Avenue
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Attorneys for Flynt Distributing Company, Inc.